Pebble v. EPA
Talking Points

- The Pebble Deposit, located in Southwest Alaska, is one of the world's largest deposits of copper, gold, and molybdenum. In 2001, Northern Dynasty Minerals ("NDM"), the owner of the Pebble Limited Partnership ("PLP"), acquired mineral claims in the area surrounding the Pebble Deposit.

- PLP intended to submit a Section 404 Clean Water Act ("CWA") permit application to the Army Corps of Engineers ("Corps").

    - Under CWA Section 404, Congress authorized the Corps to issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites. 33 U.S.C. § 1344(a). If EPA determines that the discharge of dredged or fill material "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas," Section 404(c) permits it to veto the Corps' decision.

    - Thus, typically, a developer submits a Section 404 permit application to the Corps. Once the application is filed, the National Environmental Policy Act ("NEPA") requires the Corps to prepare an Environmental Impact Statement ("EIS"). EISs are most often developed by expert third-party consultants who are entirely independent from project proponents or other stakeholder interests. An EIS reviews, among other things, social and economic impacts (including employment effects, energy costs, tax payments, and land development), and mitigation opportunities. The point of an EIS is to give the permitting agency and the public a reasoned understanding of impacts before making a final decision on the permit. Other federal agencies have an opportunity to contribute and comment on the EIS, and the public also gets a chance to comment and critique the draft EIS before it is made final.

        - While the NRDC has taken the position that EPA has the authority to veto the Pebble mine before an EIS is prepared under NEPA, this view is contrary to their longstanding position that "[m]uch like the Magna Carta protected people from the dangers of monarchical rule, NEPA protects people by providing transparency in federal projects. Both the Magna Carta and NEPA espouse the ideals of public participation and democracy by giving citizens a voice in government decisions."

    - Ultimately, if the project is being approved, a final EIS is issued, along with a Record of Decision that documents that the permit is being granted and describing why.

    - In 1992, EPA and the Corps entered into a binding Memorandum of Agreement (the "1992 MOA"), which was negotiated during President George H.W. Bush's administration and endorsed by President William J. Clinton. The 1992 MOA was executed after a Congressional mandate required federal agencies to minimize delays in the issuance of Section 404 permits, responding to complaints that the permitting process was too slow and cumbersome. The 1992 MOA states that the Corps "is solely

responsible for making final permit decisions." While it recognizes EPA's "important role" in the process, it makes clear that EPA's pre-decisional role as to significant projects (as here) is limited to providing comments and any invocation of Section 404(c), if warranted, is to occur *after* its review of the Corps' Statement of Findings/Record of Decision "prepared in support of a permit decision."

- Despite this agreement, here the Obama Administration's EPA initiated the 404(c) veto process even though PLP had not submitted a permit application and, consequently, before the Corps could do a full analysis and issue a permit decision that was grounded in an evaluation of PLP's specific mining proposal. EPA has conceded that its preemptive veto had "[n]ever been done before in the history of the [Clean Water Act]."

- There is evidence that as early as 2010 EPA had decided to veto the Pebble mine and it worked closely with anti-mine activists to achieve this result.

  - By December 2009, the Section 404(c) issue had become significant enough inside the Agency "that then-EPA Administrator Lisa Jackson requested a staff briefing on Pebble Mine." EPA emails show that after this meeting, "the Pebble issue in general [was] a priority for Lisa Jackson."

  - In early 2010, an EPA employee, who would later be appointed as the technical lead for the scientific analysis prepared by EPA to justify its preemptive 404(c) veto, helped to edit a petition that requested that the Agency initiate a 404(c) veto of the Pebble project, submitted by an anti-mine activist and attorney for several Alaska Native Tribes.

  - EPA's decision to veto any Pebble mine permit application was communicated to other federal agencies. In September 2010, a Fish & Wildlife Service employee circulated a briefing paper entitled, "EPA to Seek [Fish & Wildlife] Service Support When They Use Section 404(c) of the Clean Water Act."

  - EPA officials noted in the fall of 2010, that the Agency could minimize "litigation risk" by using a process of "information gathering and analysis…in order to support a decision to formally initiate…404(c)." Given this, rather than waiting for an independently developed EIS, EPA crafted its own scientific assessment to evaluate mining impacts -- the Bristol Bay Watershed Assessment ("BBWA").

  - During the BBWA process, EPA granted access to its decision-making process at Pebble to a cadre of environmental and anti-mine activists – access that was denied to the Pebble Partnership and allied parties, including certain Alaska Native Tribes. EPA repeatedly requested background, briefings, and data from these environmental and anti-mine activists to support its 404(c) veto, even inviting some anti-mine scientists to meetings to discuss mining scenarios it would use in the BBWA. In the end, EPA and these anti-mine activists communicated – by phone, in writing, via webinar, or in person – well over 500 times since 2009.

- The BBWA is wholly inadequate to form the basis of a regulatory decision.

- Numerous BBWA contractors and contributors had previously expressed anti-Pebble bias, yet their work was relied on in EPA's supposed objective analysis. For example, one BBWA author remarked in 2009: "[t]his [i.e., a decision vetoing Pebble] is going to happen and it's going to get bloody. I am looking forward to it!"

- Because PLP has never filed a Section 404 permit application, the BBWA authors invented hypothetical mining scenarios, causing EPA to admit that "[t]he exact details of any future mine plan for the Pebble Deposit or for other deposits in the watershed will differ from our mine scenarios."

- Numerous peer reviewers seriously criticized the BBWA and the science underlying its conclusions, pointing out that it provided an insufficient basis for regulatory decision-making. As one peer reviewer told EPA, "because of the hypothetical nature of the approach employed, the uncertainty associated with the assessment, … the utility of the assessment, is questionable." The State of Alaska concurred with this observation, concluding that the hypothetical mine scenarios "do not represent the only options and outcomes that could apply to a mine in the Bristol Bay area."

    - EPA's focus on its own hypothetical mine scenarios also led the BBWA to adopt assumptions that do not reflect PLP's actual plans that would be spelled out in a permit application. First, the BBWA arbitrarily assumes that the mine would employ "conventional" mining practices. PLP, however, has explicitly committed to mine construction adhering to "international best practice" standards. International best practice for a mine as large as the proposed PLP project would include methods for preventing, mitigating, and (when necessary) compensating for environmental impacts.

- These hypothetical mine scenarios also led to equally hypothetical environmental impacts. For example, the BBWA assumes that a mine would release surplus water into only two of three streams available to the project, causing a potentially adverse impact on the surrounding ecosystem. This wholly arbitrary assumption would never be allowed by state or federal regulatory agencies. If, instead, EPA had chosen to assume that surplus water would have been released into all three available steams in equal amounts, it would have concluded, for each hypothetical mine scenario, that the change in streamflow would involve a relatively high level of ecosystem protection, rather than finding potential impacts.

- An independent review led by former U.S. Senator and Secretary of Defense William S. Cohen found that EPA's conduct "raise[s] serious concerns as to whether EPA orchestrated the process to reach a pre-determined outcome; had inappropriately close relationships with anti-mine advocates; and was candid about its decision-making process." The Cohen Group, *Report of An Independent Review Of The United States Environmental Protection Agency's Actions In Connection With Its Evaluation Of Potential Mining In Alaska's Bristol Bay Watershed* (Oct. 6, 2015) at 8.

- In September 2014, PLP sued EPA alleging the Agency violated the Federal Advisory

Committee Act, a statute designed to ensure that special interests do not hijack agency decision-making processes to produce biased studies and that the Government consults with interested parties in an open, transparent, and even-handed manner. In November 2014, the Court found a likelihood of success on at least one of PLP's claims and issued a preliminary injunction preventing EPA from taking any further action to veto the project until it adjudicates the merits of the case.

- To remedy the harm caused by EPA's actions, and in consideration for dismissal of PLP's pending FACA lawsuit, PLP has three asks:

Withdraw Veto. EPA must withdraw its pending veto and send a letter to the Army Corps of Engineers notifying it of the withdrawal and advising the Corps that it should process any PLP permit application, as required by their regulations. Language to accomplish this:

> "Immediately upon the Effective Date of this Settlement Agreement, EPA shall initiate its withdrawal of the Proposed Determination pursuant to 40 C.F.R. § 231.5(c). In particular, on the Effective Date of this Settlement Agreement the Region 10 Regional Administrator, or acting Region 10 Regional Administrator, shall notify the Administrator by mail, with a copy to the Assistant Administrator for Water and Waste Management, of his or her intent to withdraw the Proposed Determination. EPA's Administrator shall not elect to review such withdrawal. Ten days after the Regional Administrator transmits to the Administrator his or her intent to withdraw the Proposed Determination, the Regional Administrator shall give notice of the withdrawal, in accordance with 40 C.F.R. § 231.5(c)."

Foreswear Future Use of the BBWA with Respect to Our Project.

> "EPA may not use or rely on the Bristol Bay Watershed Assessment for purposes of evaluating any PLP project, including any Section 404 permit application."

Commit to Honoring Two Key Elements of the 1992 MOA Process that Will Insure "Normal Order" of Review on a Fully Developed Record of PLP's Specific Proposal.

> "If PLP submits a Permit Application to the United States Army Corps of Engineers seeking to develop the Pebble deposit, EPA agrees not to initiate any Section 404(c) proceeding with respect to the Pebble deposit until it has (i) elevated the permit decision, pursuant to Paragraph 3 of Part IV of the "Memorandum of Agreement Between The Environmental Protection Agency and The Department of the Army" ("MOA"), signed August 11, 1992, and (ii) reviewed the Statement of Findings/Record of Decision prepared by the United States Army Corps of Engineers in support of its permit decision, as provided in Paragraph 3(h) of Part IV of the MOA."